

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHAD COOK, individually,

Plaintiff,

vs.

TASER INTERNATIONAL, INC., et al.,

Defendants.

Case No. 2:04-cv-01325-PMP-GWF

ORDER

This matter is before the Court on Plaintiff's Motion to Compel Discovery Pursuant to FRCP 37(a) and LR 26-7 (#23), filed on February 16, 2006; Defendant's Opposition to Motion to Compel (#42), filed on April 14, 2006; Defendant's Supplement to its Opposition to Motion to Compel (#43), filed on April 18, 2006; Plaintiff's Reply in Support of Plaintiff's Motion to Compel Discovery (#48), filed on May 9, 2006; and Defendant's Supplementary Status Report (#51), filed on May 24, 2006.

DISCUSSION

The Court conducted a hearing in this matter on April 18, 2006 and entered its Order (#45) on April 24, 2006 which partially granted Plaintiff's Motion to Compel Discovery (#23) by ordering Defendant to produce the documents it previously agreed to produce and to complete that production on or before May 22, 2006. The Court also ordered Defendant to serve and file an amended privilege log regarding the spreadsheet documents it claims are protected from disclosure under the attorney-client privilege or the attorney work-product doctrine. The Court's Order also granted Plaintiff additional time to file a reply in support of its Motion, including providing the Court with copies of the

1 formal requests for production previously served by Plaintiff. The Court further stated that the Court
2 would not award sanctions/fees “at this time” and scheduled a further hearing in this matter for May
3 25, 2006. As indicated above, Plaintiff filed his Reply (#48) on May 9, 2006 and the Defendant filed
4 its Supplementary Status Report (#51) in advance of the hearing on May 24, 2006.

5 **1. Production of Documents Previously Ordered Produced.**

6 As set forth in Defendant’s Supplementary Status Report (#51), and as counsel for both parties
7 confirmed at the May 25th hearing, since entry of the Court’s prior order (#45) on April 24, 2006, the
8 parties have worked in a cooperative manner regarding the production of the voluminous documents
9 that the Court ordered be produced by May 22, 2006. Although not all of the documents have been
10 produced, it appears that the parties and their counsel are diligently working toward that end and no
11 further order regarding production of those documents is required at this time. On May 17, 2006, the
12 Court granted the parties’ stipulation and order to extend the discovery cut-off date through
13 November 3, 2006, and the parties have sufficient time in which to complete the remaining production
14 of documents and complete other discovery.

15 **2. Attorney-Client Privilege and Work-Product Documents**

16 In compliance with the Court’s prior order (#45), Defendant also served and filed its amended
17 privilege logs regarding the spreadsheet documents to which it claims attorney-client privilege or
18 work-product doctrine immunity from disclosure. With the exception of two potential issues, Plaintiff
19 does not dispute Defendant’s assertion of privilege or work-product immunity regarding these
20 documents. The potential issues raised by Plaintiff regarding Defendant’s assertion of attorney-client
21 privilege or work-product doctrine immunity are as follows:

22 In his Reply, Plaintiff argues that because Defendant claims that all of its charts or documents
23 regarding the human volunteer exposure data are either privileged or have been produced, it should be
24 foreclosed from offering “any kind of chart, spreadsheet, or exhibit at trial until it satisfies this Court
25 that the exhibit is not the same as its privileged documents.” *Reply* (#48), page 8. Plaintiff also argues
26 that Defendant should be foreclosed from asserting at trial that it created any documents, other than
27 those produced to Plaintiff, that analyze “the human volunteer exposure for any safety or other
28 concerns raised by the use of the M26 Advanced Taser.” *Id.* By this latter statement, the Court

1 understands Plaintiff to argue that Defendant's witnesses should not be allowed to testify at trial that
 2 their testimony is based on allegedly privileged spreadsheets or data compilations that have not been
 3 disclosed or produced to Plaintiff and which Plaintiff would therefore have no ability to cross-examine
 4 the witnesses about.

5 In its Supplementary Status Report, Defendant responds to the foregoing statement by Plaintiff
 6 as follows:

7 In his reply brief, Plaintiff asks the Court to order that if the
 8 spreadsheets are not produced that TASER not be allowed to utilize the
 9 spreadsheets in defense of this action. TASER has no objection to
 Plaintiff's request, which is reasonable. *Supplementary Status Report*
 (#51), page 3.

10 At the May 25, 2006 hearing, Defendant's counsel indicated that any summaries of evidence
 11 that Defendant prepares for use at trial would not be based on the privileged documents. The Court
 12 can foresee that if Defendant identifies in its pretrial disclosures under Fed.R.Civ.Pro. 26 (a)(3)
 13 exhibits, including summaries of other evidence, which resemble in form or content the spreadsheets or
 14 data compilations that it claims are protected from disclosure, that an issue will arise as to the use or
 15 introduction of such exhibits at trial. In view of the foregoing statement in Defendant's Supplementary
 16 Status Report, Defendant should tread cautiously in designating or attempting to use such exhibits if it
 17 does not produce the privileged documents.

18 The second issue regarding the privileged documents raised by Plaintiff's counsel during the
 19 May 25, 2006 hearing is that one of the amended privilege log entries indicates that the privileged
 20 documents have been disclosed to an employee in Defendant's sales department. Plaintiff's counsel
 21 suggests that this entry may indicate that the allegedly privileged document(s) was disclosed to and/or
 22 for use by employees of Defendant outside the scope of the attorney-client privilege or work-product
 23 immunity which would constitute a waiver of the privilege or immunity claimed by Defendant.
 24 Defendant's amended privilege logs, affidavits and other representations in support of its attorney-
 25 client privilege and work-product immunity assertions constitute a *prima facie* showing of privilege.
 26 *Diamond State Insurance Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 698 (D.Nev. 1994), citing *In re*
 27 *Grand Jury Investigation*, 974 F.2d, 1068, 1070 (9th Cir. 1992). As the term *prima facie* indicates,
 28 once a satisfactory showing of privilege has been made, the burden of overcoming the assertion of

1 privilege shifts to the party seeking disclosure to demonstrate that the privilege does not apply or has
2 been waived. Plaintiff, therefore, is not foreclosed from conducting further discovery to determine
3 whether the attorney-client privilege and work-product immunity applies or has been waived. As
4 discussed at the hearing, this issue may potentially be resolved to Plaintiff's satisfaction, without the
5 necessity of deposition(s), by Defendant providing a supplemental explanation regarding the sales
6 employee's involvement with the privilege documents. Based on the present record, however, the
7 Court makes no finding that Defendant's assertion of privilege or immunity does not apply or has been
8 waived.

9 **3. Plaintiff's Request for An Award of Attorney's Fees and Costs Relating to**
10 **Its Motion to Compel.**

11 In its Reply and at the hearing on May 25, 2006, Plaintiff renewed his request for an award of
12 attorney's fees and costs on the Motion to Compel.

13 Fed.R.Civ.Pro. 37(a)(4) provides that if a motion to compel is granted or if the disclosure or
14 requested discovery is provided only after the motion was filed, then the court is required to award the
15 movant his reasonable expenses, including attorney's fees, unless the court finds that the motion was
16 filed without the movant's first making a good faith effort to obtain the discovery without court action,
17 or the opposing party's objections were substantially justified, or other circumstances make an award
18 of fees unjust. Consistent with the provisions of the rule, the court in *Shuffle Master, Inc. v.*
19 *Progressive Games, Inc.*, 170 F.R.D. 166, 170 (D. Nev. 1996), held that the moving party was not
20 entitled to an award of fees and expenses where it failed to demonstrate that it had complied with its
21 obligations to make a meaningful effort to meet and confer with the opposing party prior to filing the
22 motion.

23 Unlike *Shuffle Master*, the facts in this case are not clear-cut as to whether or not Plaintiff
24 satisfied the meet and confer obligations prior to filing his motion. As evidenced by the exhibits
25 attached to his Reply, Plaintiff served requests for production on Defendant in February, 2005 to
26 which Defendant responded in April, 2005. Plaintiff served a second set of requests in May 2005 to
27 which Defendant responded in August 2005. On August 25, 2005, Plaintiff deposed Defendant's chief
28 executive officer. During that deposition, there was additional discussion between counsel regarding

1 Plaintiff's request for documents, including allegedly confidential documents and spreadsheets, one of
2 which was later produced and others as to which Defendant asserts privilege. During that deposition,
3 Defendant agreed to produce additional documents subject to a protective order. On or about
4 September 21, 2005, Plaintiff's counsel forwarded a proposed protective order to Defendant's
5 counsel. Defendant's counsel did not respond regarding the protective order and there was no follow-
6 up by Plaintiff's counsel's office until late January 2006.

7 The follow-up communications between Plaintiff and Defendant in January, 2006, however,
8 were not directly between the attorneys, themselves, but rather involved an exchange of phone calls
9 between their respective paralegals. Although Plaintiff's counsel states that his paralegal attempted to
10 obtain a response to the protective order and production of the documents, Defendant's former
11 counsel and her paralegal stated in their affidavits that these phone calls related to information received
12 by Plaintiff's counsel that Defendant had or was retaining new counsel. Defendant's former counsel
13 and paralegal deny that Plaintiff's paralegal requested or inquired about further production of
14 documents or approval of the protective order.

15 Apparently believing that his paralegal had made unsuccessful efforts to obtain the documents
16 that Defendant previously agreed to produce, Plaintiff's counsel faxed a letter to Defendant's former
17 counsel on January 31, 2006 memorializing his paralegal's efforts to obtain the documents. According
18 to Defendant's former counsel, however, this letter was sent to the wrong fax number and was never
19 received by her. Prior to filing his motion, Plaintiff's counsel did not make any further phone calls to
20 Defendant's former or new counsel in an attempt to resolve the dispute without court action. Both
21 Defendant's former and present counsel state that they first became aware of Plaintiff's counsel's
22 efforts to compel production when they received the subject Motion to Compel. Plaintiff's counsel
23 acknowledges that since the motion to compel was filed, Defendant's present counsel has acted
24 reasonably and exercised diligence in producing documents, communicating with him and in
25 responding to other discovery issues. *Shuffle Master* states that the meet and confer requirements
26 generally require that counsel personally consult, either through a telephonic or face-to-face
27 conference in an effort to resolve discovery disputes. Arguably, efforts to obtain compliance with
28 discovery requests can be delegated to paralegal staff. Prior to filing a motion to compel, however, it

1 is better practice, if not a requirement of the rule, that the attorney for the party seeking discovery
2 personally attempt to confer with opposing counsel in an effort to resolve the dispute or obtain
3 compliance. Delegating this responsibility to paralegal staff is likely to result in the type of uncertainty
4 or confusion evident in this case.

5 The Court would be more inclined to award Plaintiff his expenses, at least for being required
6 to file the motion, if it was satisfied that Defendant's former counsel and/or present counsel had
7 received Plaintiff's January 31, 2006 letter or if Plaintiff's counsel had personally followed up with a
8 phone call after that letter was sent. Plaintiff's counsel has not rebutted the credible information
9 presented by Defendant's former and present counsel, however, that his letter was never received
10 because of the incorrect fax-telephone number.

11 In weighing this matter, the Court also takes in consideration Defendant's diligent conduct in
12 responding to Plaintiff's discovery requests after the motion was filed. While these actions would not
13 be a defense to an award of expenses under Rule 37 if Plaintiff clearly had complied with the meet and
14 confer requirements prior to filing his motion, given the ambiguous record in this case, the Court will
15 not grant Plaintiff's request for attorney's fees and costs in this matter. Accordingly,

16 **IT IS HEREBY ORDERED** that Plaintiff's Motion to Compel Discovery Pursuant to FRCP
17 37(a) and LR 26-7 (#23) is **Granted**, in part, and **Denied** as follows:

18 1. It appears that Defendants are in the process of complying with the production of
19 documents as directed by the Court in its order (#45) entered on April 24, 2006 and that no further
20 order regarding production of those documents is required at this time.


21 2. Plaintiff's motion is denied as to production of the spreadsheets and other documents to
22 which Plaintiff objects based on its assertion of the attorney-client privilege or work-product doctrine.
23 As set forth in this order, Defendant has made a *prima facie* showing that the privilege and/or
24 immunity applies to these documents. Plaintiff is not precluded, however, from pursuing further
25 discovery to overcome Defendant's assertion of the attorney-client privilege or work-product doctrine.

26 3. Defendant shall be barred from offering any of the documents which it has withheld as
27 attorney-client privileged or protected work-product documents as exhibits at trial, and Defendant
28 shall be further barred from introducing other substantially similar exhibits which are prepared based

1 on the privileged documents. Defendant shall also be barred from asserting at trial that it created any
2 documents, other than those produced to Plaintiff, that analyze the human volunteer exposure for any
3 safety or other concerns raised by the use of the M26 Advanced Taser.

4 4. Plaintiff's request for an award of fees and costs in filing its motion is denied.

5 DATED this 26th day of May, 2006.

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8 GEORGE FOLEY, JR.
9 U.S. MAGISTRATE JUDGE
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